Coca Cola Refreshments Malaysia Sdn Bhd v Leejin Capital Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA28PW-23–01 OF 2021
NADZARIN WOK NORDIN JC
6 AUGUST 2021

Insolvency Law — Winding up — Liquidator — Appointment of liquidator — Whether extension of time should be granted — Whether a seconder was required before nomination of proposed liquidator could be put to vote — Whether the appointment of liquidator was valid — Companies Act 2016 s 450 — Companies (Winding-Up) Rules 1972 r 119

In the originating summons dated 21 January 2021 ('OS'), the plaintiff sought, inter alia, an extension of time as the majority creditor of the defendant to file the OS pursuant to s 450 of the Companies Act 2016, as well as a declaration that the appointment of Lim Tian Huat ('Lim') from Messrs Rogers Reidy & Co as the liquidator of the defendant on 14 August 2020 was invalid and that consequently, Lim was to be removed and one Onn Kien Hoe ('Onn') from Messrs Crowe Advisory to be appointed as the liquidator of the defendant effective immediately from the date of the order or alternatively that Onn be appointed as joint liquidator of the defendant. On 5 April 2016, the plaintiff and the defendant entered into a distributors agreement whereby the defendant was to purchase the plaintiff's products and thereafter be authorized to distribute it accordingly ('the contract'). Then, the defendant furnished a bank guarantee in the sum of RM1.1m in the plaintiffs favour as security for the contract ('bank guarantee'). As at 10 October 2019, the outstanding sum owed to the plaintiff for goods delivered to the defendant was RM2,522,019.09, which the defendant had yet to settle despite numerous reminders. Consequently, the plaintiff called on the bank guarantee to set off the outstanding sum and having deducted the same, the balance outstanding owed to the plaintiff was RM1,422,019.09 ('the outstanding sum'). On 6 July 2020 the plaintiff commenced legal proceedings against the defendant for the outstanding sum in Kuala Lumpur High Court Suit No WA-22NCC-276–07 of 2020 ('Suit 276'). On 23 July 2020, the defendant through its solicitors issued a letter to the plaintiff's former solicitors notifying that the creditors voluntary winding up ('CVW') had been initiated on 17 July 2020 pursuant to s 441 of the Companies Act 2016 and the plaintiff was informed that Suit 276 could not proceed without leave of the court, the first creditors meeting would be held on 14 August 2020 ('creditors meeting'). As a result of the CVW, the plaintiff had to withdraw Suit 276 with liberty to file afresh on 6 July 2020. The issues that arose for determination were: (a) whether an extension of time

should be granted to file the application; (b) whether a seconder was required before the nomination of a proposed liquidator could be put to vote; and (c) whether the appointment of liquidator was valid.

Held, allowing the application with no order as to costs:

(1) After due consideration of the time taken by the plaintiff in communicating with the defendant and the subsequent filing of the OS, the learned judicial commissioner found that the delay was not unreasonable and was sufficiently and cogently explained by the plaintiff and the late filing of the OS was done with the intention of preventing the defendant from having to incur more costs. By virtue of s 582 of the Companies Act 2016, such technical non-compliance could only invalidate a proceeding under the Companies Act if the court was of the view that substantial injustice had been or might be caused by such non-compliance and the injustice could not be remedied by any court order, of which the defendant had failed to show that any injustice has been caused to it by reason of the plaintiff's non-compliance with the seven day period stated in s 450 of the Companies Act 2016. In the circumstances, the court exercised its discretion to extend the time period under s 450 of the Companies Act 2016 (see paras 24 & 26–27).

(2) The court held that the principles enunciated by His Lordship Mohd Nazlan in *QB Khidmat Teguh Sdn Bhd v Pembinaan Legenda Unggul Sdn Bhd & Anor* [2017] 8 MLJ 376 that a creditors choice of liquidator prevails over that of the members of a company and that the voting is based on the value of the creditors claims as being equally applicable in a matter which concerns the present s 450 of the Companies Act 2016. The court further held that in a situation where there were only two creditors in a creditors meeting, the application of r 119 of the Companies (Winding-Up) Rules 1972 in respect of a majority in number and value of the creditors must be read subject to the provisions of s 521(2) of the Companies Act 2016 and that the said section must prevail over the Companies (Winding-Up) Rules 1972 which did not provide for a situation similar to that as is before this court ie where there can never be a majority in number voting due to the fact that the company has only two creditors in number and where there will be an obvious impasse created when the said creditors are unable to agree with one another. The provisions in a statute, being the primary legislation, must always prevail over that of the rules which were contained in a subsidiary legislation. There was no requirement under the s 450 of the Companies Act 2016 or r 119 of the Companies (Winding-Up) Rules 1972 that a seconder was required before a nomination of the proposed liquidator could be put to a vote (see paras 38–40 & 42).

(3) The court further decided that the facts and events that transpired at the meeting in so far as the reasons given by Chua as the chairman of the meeting, its lawyer and TSD as the proxy of the defendant, as well as the representatives of the then interim liquidator that the plaintiffs nomination of Onn could not be carried through, could not be used as a valid reason to prevent the plaintiff to exercise its right to nominate Onn and to prevent the plaintiff from utilising the fact that the plaintiff was the creditor with a majority in value to not only nominate but vote for their choice of liquidator. The court also found that no legal authority had been put forth to the court that a seconder was required in any meeting for a proposal to be carried through and/or voted upon. Even if such a requirement for a seconder did exist, it would be most unfair to the plaintiff to insist on the same and it would also be unjust as the effect of insisting on a seconder in the circumstances of the case would be to deprive the plaintiff of its statutory and legal right pursuant to s 521(2) of the Companies Act 2016 to have regard to the value of the plaintiffs debt as a majority creditor in value of the defendant (see paras 45–46).

(4) The court was of the view that s 450(1), (2) and (3) of the Companies Act 2016 expressly mentioned the word 'nominate' which the court found required a person who was to be appointed as a liquidator must be nominated and in the absence of Lim being nominated by any party, Lim's appointment as the liquidator of the defendant was invalid. Thus, in order to protect the interest of the defendant's creditors, this court granted an order in terms of paras (a), (b), (c) of the OS but made no order as to costs due to the plaintiff not filing the OS within the time prescribed under s 450 of the Companies Act 2016 (see paras 48–49).

[Bahasa Malaysia summary

Dalam saman pemula bertarikh 21 Januari 2021 ('SP'), plaintif memohon, antara lain, lanjutan masa sebagai pemiutang majoriti defendan untuk memfailkan SP menurut s 450 Akta Syarikat 2016, serta deklarasi bahawa pelantikan Lim Tian Huat ('Lim') dari Tetuan Rogers Reidy & Co sebagai pelikuidasi defendan pada 14 Ogos 2020 adalah tidak sah dan akibatnya, Lim akan diganti oleh Onn Kien Hoe ('Onn') dari Tetuan Crowe Advisory untuk dilantik sebagai pelikuidasi defendan berkuat kuasa serta-merta dari tarikh perintah tersebut atau sebagai alternatif bahawa Onn dilantik sebagai pelikuidasi bersama defendan. Pada 5 April 2016, plaintif dan defendan telah memeterai perjanjian pengedar barangan di mana defendan adalah untuk membeli produk plaintif dan selepas itu diberi kuasa untuk mengedarkannya ('kontrak tersebut'). Kemudian, defendan memberikan jaminan bank dalam jumlah RM1.1 juta yang memihak kepada plaintif sebagai jaminan untuk kontrak ('jaminan bank'). Sehingga 10 Oktober 2019, jumlah tunggakan yang terhutang kepada plaintif untuk barangan yang dihantar kepada defendan adalah RM2,522,019.09, yang masih belum diselesaikan oleh defendan

walaupun terdapat banyak peringatan diberikan. Oleh itu, plaintif meminta jaminan bank untuk melepas jumlah tertunggak dan setelah ditolak, baki tertunggak yang terhutang kepada plaintif adalah RM1,422,019.09 ('jumlah tertunggak tersebut'). Pada 6 Julai 2020, plaintif memulakan prosiding undang-undang terhadap defendan bagi jumlah tertunggak dalam Saman Mahkamah Tinggi Kuala Lumpur No WA-22NCC-276-07 Tahun 2020 ('Guaman 276'). Pada 23 Julai 2020, defendan melalui peguamnya mengeluarkan surat kepada bekas peguam plaintif yang memaklumkan bahawa penggulungan sukarela pemiutang ('CVW') telah dimulakan pada 17 Julai 2020 menurut s 441 Akta Syarikat 2016 dan plaintif dimaklumkan bahawa Guaman 276 tidak dapat diteruskan tanpa kebenaran mahkamah, mesyuarat pemiutang pertama akan diadakan pada 14 Ogos 2020 ('mesyuarat pemiutang tersebut'). Akibat CVW tersebut, plaintif terpaksa menarik balik Guaman 276 dengan kebebasan untuk memfailkan saman pada 6 Julai 2020. Isu-isu yang timbul untuk penentuan mahkamah ini adalah; (a) sama ada pelanjutan masa harus diberikan untuk memfailkan permohonan tersebut; (b) sama ada seorang sekunder diperlukan sebelum penamaan pelikuidasi yang dicadangkan boleh dimasukkan ke dalam undi; dan (c) sama ada pelantikan pelikuidasi adalah sah.

Diputuskan, menolak permohonan dengan tanpa perintah untuk kos:

(1) Selepas pertimbangan sewajarnya mengenai masa yang diambil oleh plaintif untuk berhubung dengan defendan dan pemfailan OS berikutnya, pesuruhjaya kehakiman terpelajar mendapati bahawa kelewatan tersebut tidak munasabah dan pemfailan lewat OS dilakukan dengan niat untuk menghalang defendan daripada menanggung lebih banyak kos. Menurut s 582 Akta Syarikat 2016, ketidakpatuhan teknikal sedemikian hanya boleh membatalkan prosiding di bawah Akta Syarikat sekiranya mahkamah berpendapat bahawa ketidakadilan yang besar telah atau mungkin disebabkan oleh ketidakpatuhan tersebut dan ketidakadilan itu tidak dapat diperbaiki oleh mana-mana perintah mahkamah, di mana defendan di dalam kes ini gagal menunjukkan bahawa ketidakadilan telah disebabkan oleh ketidakpatuhan plaintif terhadap tempoh tujuh hari yang dinyatakan dalam s 450 Akta Syarikat 2016. Dalam keadaan ini, mahkamah menggunakan budi bicaranya untuk melanjutkan tempoh masa di bawah s 450 Akta Syarikat 2016 (lihat perenggan 24 & 26–27).

(2) Mahkamah ini berpendapat bahawa prinsip-prinsip yang dinyatakan oleh Yang Arif Mohd Nazlan di dalam kes *QB Khidmat Teguh Sdn Bhd v Pembinaan Legenda Unggul Sdn Bhd & Anor* [2017] 8 MLJ 376 bahawa pilihan pemiutang pelikuidasi mengatasi ahli-ahli syarikat dan bahawa pengundian adalah berdasarkan kuasa pemiutang di dalam perkara yang berkaitan dengan s 450 Akta Syarikat 2016. Mahkamah selanjutnya berpendapat bahawa di dalam keadaan di mana hanya terdapat dua

pemiutang dalam mesyuarat pemiutang, permohonan k 119 Kaedah-Kaedah Syarikat (Penggulungan) 1972 berkenaan dengan majoriti bilangan dan nilai pemiutang mesti dibaca tertakluk kepada peruntukan s 521(2) Akta Syarikat 2016 dan seksyen tersebut mesti mengatasi Kaedah-Kaedah Syarikat (Penggulungan) 1972 yang tidak menyediakan keadaan yang serupa dengan yang seperti di hadapan mahkamah ini iaitu di mana tidak pernah ada majoriti dalam jumlah mengundi kerana syarikat tersebut hanya mempunyai dua pemiutang dalam dan di mana akan wujud kebuntuan yang jelas apabila pemiutang tersebut tidak bersetuju antara satu sama lain. Ini menimbulkan kebuntuan yang jelas apabila pemiutang tersebut tidak dapat bersetuju antara satu sama lain. Peruntukan dalam statut, sebagai undang-undang utama, haruslah sentiasa mengatasi peraturan yang terkandung dalam undang-undang subsidiari. Tiada keperluan di bawah s 450 Akta Syarikat 2016 atau k 119 Kaedah-Kaedah Syarikat (Penggulungan) 1972 bahawa penamaan pelikuidasi yang dicadangkan boleh dimasukkan ke dalam proses pengundian (lihat perenggan 38–40 & 42).

(3) Mahkamah ini selanjutnya mendapati bahawa sebab-sebab yang diberikan oleh Chua sebagai pengerusi mesyuarat itu, peguamnya dan TSD sebagai proksi defendan, serta wakil-wakil pelikuidasi interim ketika itu bahawa pencalonan plaintif, Onn tidak dapat dijalankan, tidak boleh digunakan sebagai alasan yang sah untuk menghalang plaintif menjalankan haknya untuk mencalonkan Onn dan untuk menghalang plaintif daripada menggunakan haknya sebagai pemiutang majoriti. Dia bukan sahaja boleh mencalonkan tetapi mengundi untuk pilihan pelikuidasinya. Mahkamah ini juga mendapati bahawa tiada kuasa undang-undang bahawa orang kedua diperlukan dalam mana-mana mesyuarat untuk cadangan yang akan dibawa dan/atau diundi. Walaupun keperluan sedemikian untuk sekunder memang wujud, adalah paling tidak adil bagi plaintif untuk mewujudkan sekunder di dalam keadaan kes tersebut kerana ianya melucutkan hak statutori dan undang-undang plaintif menurut s 521(2) Akta Syarikat 2016 untuk mengambil kira nilai hutang plaintif sebagai pemiutang majoriti di dalam syarikat defendan (lihat perenggan 45–46).

(4) Mahkamah berpendapat bahawa s 450(1), (2) dan (3) Akta Syarikat 2016 dengan jelas menyebut perkataan 'pencalonan' yang mana mahkamah ini mendapati bahawa terdapat keperluan seseorang yang akan dilantik sebagai pelikuidasi mestilah dicalonkan dan sekiranya Lim dicalonkan oleh mana-mana pihak, pelantikan Lim sebagai pelikuidasi defendan adalah tidak sah. Oleh itu, untuk melindungi kepentingan pemiutang defendan, mahkamah ini memberikan perintah di perenggan (a), (b), (c) SP tersebut tetapi tidak membuat perintah mengenai kos kerana plaintif tidak memfailkan SP dalam masa yang ditetapkan di bawah s 450 Akta Syarikat 2016 (lihat perenggan 48–49).]

Cases referred to

Bukit Melita Sdn Bhd v Revolusi Rancak Sdn Bhd [2019] MLJU 1731, CA (refd)
Chua Wah Keow v Ng Ho Huat & Anor [1961] 1 MLJ 321b, CA (refd)
Commercial Plastic Industries Sdn Bhd v Lim Chin Cheap & Ors [2002] 6 MLJ 619, HC (refd)
Hock Seng Lee Timber Sdn Bhd v Yii Chi Hau & Anor [2017] 2 MLJ 474; [2017] 3 CLJ 104, CA (folld)
Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223, CA (folld)
Kilo Asset Sdn Bhd v Hew Tai Hong [2016] 1 MLJ 785; [2016] 2 CLJ 365, FC (folld)
Nik James Ferrie Arkitek v Tenaga Gagah Sdn Bhd (Kuh Cho Sen & Ors, applicants) [2018] 12 MLJ 408, HC (distd)
QB Khidmat Teguh Sdn Bhd v Pembinaan Legenda Unggul Sdn Bhd & Anor [2017] 8 MLJ 376, HC (refd)
R v Henry [2018] 5 LRC 546 (refd)
Syarikat Marak Jaya Sdn Bhd v Syarikat Masinda Sdn Bhd [1991] 2 MLJ 417, HC (refd)

Legislation referred to

Companies (Winding-Up) Rules 1972 r 119
Companies Act 1965 (repealed by Companies Act 2016) s 228
Companies Act 2016 ss 441, 450, 450(1), (2), (3), 521(2), 582
Interpretation Acts 1948 and 1967 s 23

Matthew Thomas Philip (Alliff Benjamin Suhaimi and Phoebe Loi Yean Wei with him) (Thomas Philip) for the plaintiff.
Ahmad Shahrizal (Ranjit Ooi & Robert Low) for the defendant.

Nadzarin Wok Nordin JC:

INTRODUCTION

[1] In the originating summons dated 21 January 2021 (OS) the plaintiff, Coca Cola Refreshments Sdn Bhd ('plaintiff') is seeking, inter alia, an extension of time as the majority creditor of Leejin Capital Sdn Bhd ('defendant') to file the OS pursuant to s 450 of the Companies Act 2016, as well as a declaration that the appointment of Lim Tian Huat ('Lim') from Messrs Rogers Reidy & Co as the liquidator of the defendant on 14 August 2020 is invalid and that consequently that Lim is to be removed and one Onn Kien Hoe ('Onn') from Messrs Crowe Advisory be appointed a the liquidator of the defendant effective immediately from the date of this order or alternatively that Onn be appointed as joint liquidator of the defendant.

[2] The brief grounds on which the plaintiff in support of the OS has stated are, inter alia, as follows: A

(a) a creditors voluntary winding up ('CVW') of the defendant initiated on 17 July 2020 pursuant to s 441 of the Companies Act 2016 and the first creditors meeting was held on 14 August 2020 ('meeting'); B

(b) at the meeting the following events transpired:

(i) the plaintiff as the majority creditor proposed for Onn to be appointed the liquidator of the defendant;

(ii) the representative of the defendant and the chairman of the Meeting proposed for Lim to be the liquidator and the same was seconded by one Tan Sri David Cheng Jooi Tek (TSD) in his capacity as the minority creditor of the defendant; C

(iii) the Chairman took the position that since there was no seconder to the plaintiff's proposal for Onn to be the liquidator, the liquidator appointed will be Lim; and D

(iv) despite the plaintiff's objection on the ground that the provisions of the Companies Act 2016 do not require any secondment of the plaintiff's nomination, Lim was appointed the liquidator of the defendant. E

(c) premised on the above, the appointment of Lim is legally erroneous as it was done in blatant disregard of the express provision of the Companies Act 2016; F

(d) the defendant's conduct in appointing Lim as the liquidator is nothing more than a calculated move to deprive the plaintiff of its legal right, as the majority creditor, to have its own liquidator appointed. In this regard:

(i) it cannot be disputed that Lim was nominated by TSD who is a related party to the defendant; G

(ii) the issue is propounded by the fact that in the course of discussion between parties, the plaintiff had taken steps and attempts to inspect the documentation which would shed light on the circumstances which led to the sudden CVW of the defendant; and H

(iii) despite the above, such request were constantly met with unreasonable demand and requirements which were solely curated to prevent the plaintiff form inspecting the books and records of the defendant. I

(e) in amplification of the suspicious and/or questionable circumstances of the CVW, a perusal of the defendant's audited accounts for the years 2018 and 2019 shows that there was substantial and sudden dissipation in the assets of the defendant prior to the CVW; and

(f) notwithstanding the contentions above, subsequent to the meeting, parties (through their respective solicitors) engaged in without prejudice discussions to arrive at an understanding so as to avoid depleting the defendants resources in having to engage in litigation. The exercise was unsuccessful hence the filing of this OS at this juncture to protect the plaintiff's interest in the liquidation process of the defendant.

BRIEF BACKGROUND

[3] On 5 April 2016 the plaintiff and the defendant entered into a distributors agreement whereby the defendant was to purchase the plaintiff's products and thereafter be authorised to distribute it accordingly ('contract'). Pursuant thereto the defendant furnished a bank guarantee in the sum of RM1.1m in the plaintiff's favour as security for the contract ('bank guarantee').

[4] As at 10 October 2019, the outstanding sum owed to the plaintiff for good delivered to the defendant was RM2,522,019.09, which the defendant has yet to settle despite numerous reminders thereto.

[5] Consequently, the plaintiff called on the bank guarantee to set off the outstanding sum and having deducted the same, the balance outstanding owed to the plaintiff is RM1,422,019.09 ('outstanding sum').

[6] On 6 July 2020 the plaintiff commenced legal proceedings against the defendant for the outstanding sum in Kuala Lumpur High Court Suit No WA22NCC-276–07 of 2020 ('Suit 276').

[7] On 23 July 2020 the defendant through its solicitors issued a letter to the plaintiff's former solicitors notifying of the CVW had been initiated on 17 July 2020 pursuant to s 441 of the Companies Act 2016 and the plaintiff was informed that Suit 276 cannot proceed without leave of the court, the first creditors meeting will be held on 14 August 2020 (creditors meeting).

[8] As a result of the CVW, the plaintiff had to withdraw Suit 276 with liberty to file afresh on 6 July 2020.

THE PLAINTIFF'S CASE

[9] It is averred by the plaintiff that during the creditors meeting, the plaintiff was informed that: (i) the estimated realisable value of the defendant's assets was RM135,469.95 whereas the total estimated liabilities are approximately RM2,42,664.09; and (ii) that the defendant has only two creditors namely the plaintiff and TSD.

[10] The plaintiff submits that the following crucial facts cannot be disputed: A

(a) TSD used to be a director and shareholder of the defendant;

(b) TSD is a related party to the defendant; and

(c) the plaintiff is the majority creditor of the defendant. B

[11] It is also submitted by the plaintiff that at the creditors meeting, the following events transpired surrounding the appointment of the liquidator:

(a) Chuah Chong Nyan (Chuah), the representative of the defendant and the chairman of the creditors meeting proposed for Lim to be the liquidator of the defendant; C

(b) the plaintiff in its capacity as the majority creditor of the defendant proposed for Onn to be appointed liquidator of the defendant; D

(c) TSD by way of his proxy seconded the proposal for Lim to be appointed liquidator of the defendant;

(d) the defendant took the position that since there was no seconder to the plaintiff's proposal for the liquidator, Lim shall be appointed as the liquidator; E

(e) the plaintiff's representative vehemently objected to the provision on, inter alia, the pretext that the provisions of the Companies Act do not require any secondment of the majority creditor's proposal for liquidator; and F

(f) despite the plaintiff's objections, Lim was appointed as the liquidator of the defendant.

[12] The plaintiff contends that there was no nomination for the liquidator position by TSD and that he had merely seconded the defendant's nomination for Lim and as such the plaintiff's nomination of Onn was the sole nomination from the creditors. G

[13] It is also contended by the plaintiff that as there was an impasse on discussions post the meeting and the plaintiff's request to view certain of the defendant's documents, the plaintiff instructed its solicitors to file the OS to ensure that its rights were protected. H

[14] The plaintiff further contends that despite the plaintiff highlighting its concerns regarding the dissipation of the defendant's assets, Lim had failed to provide any detail of the steps it had taken to investigate such suspicious and/or questionable dissipation of the defendant's assets and such deliberate failure to investigate casts doubts on the impartiality of the liquidation process and I

whether the plaintiff's rights as the majority creditor will be sufficiently be protected.

[15] The dissipation of the defendant's assets is also contended by the plaintiff to be connected to the suspicious and questionable circumstances of the defendant's CVW and the liquidation process thereto, and that Lim has failed to investigate the law imposes upon him a duty to do investigate the dealings of the defendant. Lim has therefore failed to act in the best interest of the defendant and its creditors.

[16] The plaintiff further submits that Onn's appointment is necessary to protect the plaintiff's interest and that the defendant's conduct in appointing Lim as the liquidator was a calculated move to deprive the plaintiff of its legal right under s 450 of the Companies Act 2016.

[17] As to the delay in filing the OS, the plaintiff avers that they had attempted to reach an amicable resolution to protect the interest of the plaintiff and that such an approach would have saved the defendant a substantial sum of money without having to engage legal representation to defend this OS and such approach was beneficial to all the creditors. Accordingly the plaintiff argues that the extension of time is necessary for the interest of justice.

[18] The plaintiff further avers that it is ready and willing to bear all costs in the appointment of Onn as joint liquidator of the defendant.

THE DEFENDANT'S SUBMISSIONS

[19] The defendant submits that this is case where the plaintiff has acknowledged and/or accepted the appoint of Lim as the liquidator of the defendant before suddenly making a proverbial 'u-turn' and deciding to challenge the same.

[20] It is also submitted by the defendant that in order to bridge the gap in terms of the delay in the said challenge, correspondences and discussions were contrived months after the liquidators appointment.

[21] The defendant further, inter alia, states that:

(a) a without prejudice virtual meeting was held where the plaintiff's representatives highlighted various concerns about an alleged dissipation of the defendants assets and wanted to look into the affairs or books of the defendant;

(b) the plaintiff's representatives were informed that the defendant has limited funds available and such proposed investigations would diminish and/or deplete the finds of the defendant;

(c) the plaintiff responded that it was prepared to carry out its own investigations and requested for access to the books of the defendant subject to costs to be incurred and to be borne by the plaintiff;

(d) it was not unreasonable for the plaintiff to bear the expenses arising from the plaintiff's own request and clarified that only one of the defendant's representatives would be present;

(e) the plaintiff has not rendered a satisfactory explanation for the delay in seeking the intervention of the court in a matter which they claim allegedly affected their rights;

(f) the plaintiff was aware of the time frame to apply to the court for directions which was expressly informed to the plaintiff at the meeting;

(g) Lim and/or the company was not liable to incur any expense in relation to the winding up unless there are sufficient assets available;

(h) the plaintiff is approbating and reprobating by acknowledging Lim as the liquidator by the tacit nature of the contrived correspondences/discussions but then challenging Lim's appointment thereafter;

(i) having elected to proceed with the proposed investigation on the defendant's books, which will be referred to in my grounds below, the plaintiff ought to be estopped form using this ground as a reason to sustain the OS; and

(j) the grounds advanced by the plaintiff to remove Lim are misconceived and untenable and that they are insufficient to warrant a removal of Lim and none of the grounds goes towards the conduct of Lim.

[22] The defendant submits that a conflict may arise with regards the plaintiff's proposal for the appointment of Onn as a joint liquidator.

FINDINGS OF THE COURT

Extension of time

[23] From the said evidence before this court I note that there was a period of slightly more than two months before the plaintiff had written to the liquidator and that there were no updates on the status of the liquidation. The explanation given by the plaintiff's counsel for this apparent delay in the follow up and the eventual filing of this OS was due to its attempt to reach an amicable resolution to protect the interest of the plaintiff without depleting the finances

of the defendant but since there were no viable solutions available and there was an impasse, the plaintiff then proceeded to file this OS.

[24] After due consideration of the time taken by the plaintiff in communicating with the defendant and the subsequent filing of the OS, I do find that the 'delay' is not unreasonable and was sufficiently and cogently explained by the plaintiff as above stated and I do find that the late filing of the OS herein was done with the intention of preventing the defendant from having to incur more costs. In coming to my decision on this issue, I am guided by the Court of Appeal in *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223 where Gopal Sri Ram CJA (as he then was) held:

> It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus, non dormientibus, jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable ex debito justitiae, a court may refuse relief to an indolent litigant.
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> In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion.

[25] In any event s 582 of the Companies Act 2016 provides:

> (1) No proceeding under this act shall be invalidated by any defect, irregularity or deficiency of notice or time unless the Court is of the opinion that substantial injustice has been or may be caused which cannot be remedied by any order of the Court.

[26] By virtue of the above said s 582 of the Companies Act 2016, I hold that that such technical non-compliance can only invalidate a proceeding under the Companies Act if the court is of the view that substantial injustice has been or may be caused by such non-compliance and the injustice cannot be remedied by any court order, of which I have find the defendant has failed to show that any injustice has been caused to it by reason of the plaintiff's non compliance with the seven day period stated in s 450 of the Companies Act 2016. In this regard, I have adopted a similar reasoning which can be found in the Court of Appeal case of *Hock Seng Lee Timber Sdn Bhd v Yii Chi Hau & Anor* [2017] 2 MLJ 474; [2017] 3 CLJ 104 and the Federal Court case of *Kilo Asset Sdn Bhd v Hew Tai Hong* [2016] 1 MLJ 785; [2016] 2 CLJ 365.

[27] In the circumstances, this court is hereby exercising its discretion to extend the time period under s 450 of the Companies Act 2016.

Main issues

[28] I have examined the minutes ('minutes') of the creditors meeting which can be found at exh A4 of encl 2 and find that the said meeting was conducted on 14 August 2020 and that nine individuals were present thereto which included Chuah, one Go Yuet Yern, as a proxy for the plaintiff together with one Rajeev Tandori a representative from the plaintiff, the defendant's legal advisor one Ahmad Shahrizal from the legal firm of Messrs Ranjit Ooi & Robert Low, the plaintiff's legal advisor, one Yannie Th'ng from the legal firm of Messrs Donovan & Ho, two representatives from Rogers Reidy & Co, the interim liquidator's, one Wong Fe Mei from Messrs Corw Advisory as an observer, TSD.

[29] The said minutes recorded amongst others the following:

(a) as there were no nominations for a chairman of the meeting, Chuah continued to preside over the meeting;

(b) it was informed to the attendees at the meeting that Lim was proposed by the defendants members as liquidator pursuant to the extra ordinary general meeting (EGM) held earlier in the morning and that the creditors may nominate a different person to be appointed as liquidator which will override the members nomination;

(c) a nomination was made by the proxy for the plaintiff for Onn to be appointed as liquidator after which Chuah requested for a seconder from the floor but that there was none forthcoming;

(d) the defendant's solicitor, Ahmad Shahrizal, then advised that based on s 450 of the Companies Act 2016 read together with r 119 of the Companies (Winding-Up) Rules 1972 there appears to be a need for a proposer and seconder for the nomination whereby there need to be a majority in terms of number and value for the motion to be considered;

(e) Chuah was asked if he would second the nomination of Onn but he did not as he had received a special proxy from TSD to vote for the appointment of Lim;

(f) since there was no seconder for Onn's nomination, a majority of numbers could not be obtained and hence the nomination by the plaintiff ought to be declined and the company's nomination ought to be passed;

(g) the plaintiff's representative, Rajev Tandon, highlighted that since the plaintiff had the majority in numbers, although there was no majority in numbers, the nomination of the plaintiff for Onn as liquidator should pass;

(h) the plaintiff's legal advisor challenged the defendant's solicitor by referencing to ss 521(2) and 450(2) Companies Act 2016 stating the creditor of the majority value should be given priority after which some discussions, the defendant's solicitor further clarified that the position of the defendant is that a majority in numbers and value is required for the resolution to pass;

(i) the interim liquidators representative, one Alex Chiang, had stated as there was no majority in numbers for the nomination to be considered and by that the nomination by the creditors was rejected and the company's nomination shall pass;

(j) the parties had agreed to disagree;

(k) the defendant's solicitor had advised that the creditor should make the application to court and that the application has to be made within seven days from today;

(l) there was a stalemate for the appointment of the liquidator after which Chuah then made the final decision that since there is no seconder for the nomination of Onn, Chuah motioned that the proposal to nominate Onn as liquidator is not carried out;

(m) Go Yuet Yern, the proxy for the plaintiff then puts on record the position that Onn should be nominated as the liquidator as there was a concern over the other creditor that there is a conflict of interest;

(n) after the above said discussions had taken place, the result of the voting was stated as follows:

> CCRM nominated OKG of Messrs Crowe Advisory
>
> CMM requested for the floor a seconder for the appointment of OKH. No seconder was given
>
> Based on the special proxy from TSD, TSD voted for the appointment of LTH
>
> The nominee proposed by CCRM did not obtain a majority in number and in value of the creditors for the nomination to be considered.

(o) it was thus resolved that Lim would be the liquidator; and

(p) the same was signed and confirmed as a correct record by Chuah as the Chairperson.

[30] It is therefore clear from the above said minutes that there was some disagreement on the appointment process of Lim and some discussions between the opposing parties as regards the appointment of the proposed liquidator and that the parties had agreed to disagree on the proposed nomination of Onn and that the plaintiff's proposal to nominate him was

disallowed as there was no seconder to the nomination. The evidence further shows that there was stated to be no majority in number and in value of the creditors for the nomination to be considered.

[31] The evidence also shows that TSD had voted for the appointment of Lim but that there was no actual nomination for Lim but only that the defendant had proposed that Lim be appointed as liquidator and that the only nomination was done by the plaintiff via the plaintiff's proxy.

[32] This court has also for the purpose of its decision viewed all the documents exhibited and found that the material documents to be considered included the post meeting communications which can be found at:

(a) exh A5 of enclosure being a letter dated 19 October 2020 from the plaintiff's solicitors, Messrs Thomas Philips to the liquidator wherein the plaintiff had seeked, inter alia, an update on the liquidation process and reserved its right to challenge Lim's appointment and any other decisions at the meeting;

(b) the liquidator's/defendant's solicitors letter in reply dated 22 October 2020 seeking more time to respond at exh A6 of encl 2;

(c) the plaintiff's solicitors letter dated 14 December 2020 referring to certain conditions imposed by the liquidator for a proposed inspection and stating its objections to a purported substantial costs in having to foot an hourly bill in respect of the liquidator's representatives, retrieval costs and photocopying expenses as an attempt to prevent the plaintiff from obtaining the necessary information regarding the defendant; and

(d) the defendant's solicitors letter dated 15 December 2020 at exh A2 of the defendant's affidavit at encl 6.

[33] I have also perused the defendant's 'Report and Financial Statement For the Year Ended 30.6.20218 and 30.6.2019' respectively which are both shown at exh A8 of encl 2 and find that the same shows that the defendants had RM4,583,797 as its total assets in the year ending 2018 but that the same had been reduced to a total of RM1,340,462 for the year ending 2019.

[34] I further find that although the matters raised in the OS herein were not raised in this letters from the plaintiff as contended by the defendant's counsel, in particular on the point of the investigations of the liquidator on the issues raised in the OS and the liquidator not having been asked to carry out any investigations by the plaintiff; this together with Lim's conduct in the winding up is in my view not crucial to the main and crucial issue to be decided before this court being whether the appointment of Lim as the liquidator of the

defendant is valid. A such I will not delve into these issues further as this would be, as I have mentioned, side tracking the real issues to be decided.

[35] In this regard, whether there is a failure on Lim's part to provide any detail of the steps taken to investigate such suspicious and/or questionable dissipation of the defendant's assets has raised some questions, is not in my view essential to the question at hand to be decided by this court ie whether the appointment of Lim as the liquidator of the defendant is valid.

Law

[36] I will now cite the relevant statutory provisions which this court has to take into account in respect of the OS and the arguments raised by the respective counsels hereto. The said legal provisions are:

> Section 450 of the Companies Act 2016
>
> (1) The company shall and the creditors may at their respective meetings nominate a person to be a liquidator for the purpose of winding up the affairs and distributing the assets of the company.
>
> (2) If the creditors and the company nominate different persons, the person nominated by the creditors shall be liquidator and if no person is nominated by the creditors, the person nominated by the company shall be liquidator.
>
> Section 521 of the Companies Act 2016
>
> (1) The Court may, as to all matters relating to the winding up of a company, have regard to the wishes of the creditors or contributories as proved to the Court by any sufficient evidence, and may if the Court thinks fit for the purpose of ascertaining those wishes direct meetings of the creditors or contributories to be called, held and conducted in such manner as the Court directs, and may appoint a person to act as chairperson of any such meeting and to report the result of the meeting to the Court.
>
> (2) In the case of creditors, regard shall be had to the value of each creditor's debt.
>
> Section 449(3), (8) and (9) of the Companies Act 2016
>
> (3) The company shall convene the meeting at a time and place convenient to the majority in value of the creditors and shall:
>
> (a) give notice by post of the meeting to the creditors at least seven clear days; and
>
> (b) send to each creditor together with the notice of meeting, a statement showing the names of all creditors and the amounts of their claims.
>
> ...
>
> (8) The chairperson shall, at the meeting, determine whether the meeting has been held at a time and place convenient to the majority in value of the creditors and his decision shall be final.
>
> (9) If the chairperson decides that the meeting has not been held at a time and place convenient to that majority, the meeting shall lapse and a further meeting shall be summoned by the company as soon as is practicable.

Rule 119 of the Companies (Winding-Up) Rules 1972

At a meeting of creditors or contributories a resolution shall be deemed to be passed when a majority in number and value of the creditors or, as the case may be, contributories present, personally or by proxy, and voting on the resolution, have voted in favour of the resolution, the value of the contributories being determined according to the number of votes conferred on each contributory by the regulations of the company.

[37] I need only quote the case of *QB Khidmat Teguh Sdn Bhd v Pembinaan Legenda Unggul Sdn Bhd & Anor* [2017] 8 MLJ 376 where Mohd Nazlan JC (as His Lordship then was) had very ably stated the effect of the former and corresponding provisions in the previous Companies Act 1965 with regards the appointment of a liquidator in a creditors voluntary winding up as follows:

[94] But the key aspect of the creditors' meeting, one which grants the creditors the right to vote is on the appointment of the liquidator for the creditors' voluntary winding up. Once a provisional liquidator is appointed, his principal duty is to protect the assets of the company until the meeting of creditors at which the liquidator is appointed. At the creditors' meeting, *the creditors will vote for the appointment of a liquidator, with the voting being based on the value of creditors 'claims. In the event that the creditors' choice of liquidator is different from that of the members, the choice of the former prevails*. (Emphasis added.)

[38] I hold that the said principles enunciated by His Lordship Mohd Nazlan in *QB Khidmat Teguh Sdn Bhd* that a creditors choice of liquidator prevails over that of the members of a company and that the voting is based on the value of the creditors claims as being equally applicable in a matter which concerns the present s 450 of the Companies Act 2016.

[39] I further hold in amplification and not in derogation of the said *QB Khidmat Teguh Sdn Bhd* that in a situation where there are only two creditors in a creditors meeting, the application of r 119 of the Companies (Winding-Up) Rules 1972 in respect of a majority in number and value of the creditors must be read subject to the provisions of s 521(2) of the Companies Act 2016 ie 'regard shall be had to the value of each creditor's debt' and that the said section must prevail over the Companies (Winding-Up) Rules 1972 which does not provide for a situation similar to that as is before this Court i.e where there can never be a majority in number voting due to the fact that the company has only two creditors in number and where there will be an obvious impasse created when the said creditors are unable to agree with one another.

[40] My reasoning for the above is premised on that the provisions in a statute, being the primary legislation, must always prevail over that of the rules which are contained in a subsidiary legislation. Authority for this can be found in s 23 of the Interpretation Acts 1948 and 1967 which reads:

A (1) Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency'. See also the federal court case of *United Malayan Banking Corporation Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385; [2002] 2 CLJ 413.

B **[41]** On this issue, the respondent's counsel had relied on amongst others the case of *Nik James Ferrie Arkitek v Tenaga Gagah Sdn Bhd (Kuh Cho Sen & Ors, applicants)* [2018] 12 MLJ 408 to support is contention that r 119 of the Companies (Winding-Up) Rules 1972 requires that both a majority in number and in value is required for the resolution for the appointment of a liquidator
C to be carried. After reading the said case aforementioned, I find that the said case can be differentiated from the facts of the matter before me as the *Nik James Ferrie Arkitek* case was clearly decided on the premise of a distinction being made by r 119 of the Companies (Winding-Up) Rules 1972 between the
D twin requirements of value and number of creditors on the one hand before a resolution to appointment a liquidator is carried, and an application to court for appointment of a liquidator where the court shall have regard to the wishes of the majority in value of the creditors under s 228 of the Companies Act 1965 (provisions where person other than official receiver is appointed liquidator).
E The facts of *Nik James Ferrie Arkitek* is distinguishable from the facts before me as stated above, and for that reason this court will not, with due respect, place reliance on the said *Nik James Ferrie Arkitek*.

[42] I also hold that nowhere in the wordings of s 450 of the Companies Act
F 2016 or r 119 of the Companies (Winding-Up) Rules 1972 does there appear to be a requirement that a seconder is required before a nomination of the proposed liquidator can be put to a vote.

Effect of meeting

G

[43] The actions of the defendant at the meeting vis a vis the chairman of the meeting, its lawyer and TSD as the proxy of the defendant, as well as the representatives of the onterim liquidator, had effectively shut out and
H prevented the plaintiff from exercising its right to appoint a liquidator of its choice. In the facts before me, it would be virtually impossible for the plaintiff as a creditor, albeit the majority creditor, to obtain a seconder to its proposal for Onn as the liquidator of the defendant, since the defendant had only two creditors being the defendant and TSD. This tantamounted to the plaintiff
I being 'checked mate' in the meeting.

[44] The facts also show that TSD was not only a related party as the proxy of the defendant, but that TSD was also a creditor of the defendant and thus this would lead this court to the inescapable conclusion that TSD is an

interested party in ensuring that the choice of the members of the defendant ie Lim, would be voted in to be the liquidator of the defendant. A

[45] It is also this court's decision that the facts and events that transpired at the meeting in so far as the reasons given by Chua as the chairman of the meeting, its lawyer and TSD as the proxy of the defendant, as well as the representatives of the then interim liquidator that the plaintiff's nomination of Onn could not be carried through, cannot in my opinion be used as a valid reason to prevent the plaintiff to exercise its right to nominate Onn and to prevent the plaintiff from utilising the fact that the plaintiff was the creditor with a majority in value to not only nominate but vote for their choice of liquidator. B C

[46] I also find no legal authority has been put forth to this court that a seconder is required in any meeting for a proposal to be carried through and/or voted upon. Even if such a requirement for a seconder does exists, I hold that it would based on the facts of the matter before me, be most unfair to the plaintiff to insist on the same and that it would also be unjust as the effect of insisting on a seconder in the circumstances of this case would be to deprive the plaintiff of its statutory and legal right pursuant to s 521(2) of the Companies Act 2016 to have regard to the value of the plaintiff's debt as a majority creditor in value of the defendant. D E

[47] In fact, from the facts before me, I also find that Lim was never nominated by any party at the meeting be it by the plaintiff or the defendant or TSD, but that Lim was pushed through as the liquidator of the defendant purely on the basis of Chua putting Lim's name to a vote and TSD voting on the same. The minutes only refer to 'CNN (Chuah) informed that the members of the Company have proposed LTH (Lim) of RCCO be appointed as liquidator of the Company ... However CCN informed that in accordance with s450(2) of the CA 2016, the creditors may nominate a different person to be the Liquidator. The creditors nomination, if appointed, will override the members nomination ...' and that the minutes does not mention that a nomination was made at the said meeting to nominate Lim as the liquidator for the defendant. F G H

[48] It is pertinent to note that s 450(1), (2) and (3) of the Companies Act 2016 expressly mentions the word 'nominate' which I hold requires a person who is to be appointed as a liquidator must be nominated and which I hold is a further reason why this court is of the view that in the absence of Lim being nominated by any party, Lim's appointment as the liquidator of the defendant is invalid. I

[49] Thus, based on my findings above and in order to protect the interest of the defendant's creditors, this court hereby grants an order in terms of paras (a), (b), (c) of the OS but I make no order as to costs due to the plaintiff not filing this OS within the time prescribed under s 450 of the Companies Act 2016.

POSTSCRIPT

After delivering my decision via email on 6 August 2021, counsel for the defendant had, by way of two letters dated 6 August 2021 addressed to the timbalan pendaftar of this court, seeked for the matter to be clarified before me and I had thereafter fixed for both the respective counsels to come and be heard before me on 13 August 2021. At the said clarification, I was informed by the defendant's counsel that based on his records, the plaintiff's counsel had abandoned prayers (b) and (c) of the OS and was only pursuing prayers (a) and (d) and thus this court should take this into account and amend the court's decision to reflect the same as the order has yet to be perfected. This was disputed by counsel for the plaintiff who stated that he did not abandon the prayers sought for in the OS but that he conceded that he had asked for prayer (a) and (d). After hearing the respective counsels on the said date, I then adjourned the same to 20 August 2021 for further submissions.

Thereafter on the next date ie 20 August 2021, and after hearing counsels submitting further on this issue and after reading the cases of *Bukit Melita Sdn Bhd v Revolusi Rancak Sdn Bhd* [2019] MLJU 1731, *R v Henry* [2018] 5 LRC 546, *Chua Wah Keow v Ng Ho Huat & Anor* [1961] 1 MLJ 321b, *Syarikat Marak Jaya Sdn Bhd v Syarikat Masinda Sdn Bhd* [1991] 2 MLJ 417, and *Commercial Plastic Industries Sdn Bhd v Lim Chin Cheap & Ors* [2002] 6 MLJ 619 which were submitted by the respective counsels, as well as checking this court's minutes on 16 July 2021 which showed that the plaintiff had seeked for prayers (a) and (d) but did not expressly abandon prayers (b) and (c) of the OS, this court had reaffirmed its decision given on 6 August 2021 on the grounds that the plaintiff did not abandon the prayers (b) and (c) in the OS and that the court was entitled to decide on the matter in its entirety. This court further held that if there were any errors, the aggrieved party was entitled to appeal against the said decision given by this court on 6 August 2021.

Application allowed with no order as to costs.

Reported by Muhamad Azham Marwan